

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID F. FINGER)	
Claimant)	
)	
VS.)	
)	
STATE OF KANSAS)	
Respondent)	Docket No. 1,044,194 &
)	1,044,195
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Carrier)	

ORDER

Both parties requested review of the July 14, 2010 Award by Special Administrative Law Judge Jerry Shelor. The Board heard oral argument on January 12, 2011. The Division of Workers Compensation's Acting Director appointed Thomas Arnhold of Hutchinson, Kansas, to serve as Board Member Pro Tem in place of Carol Foreman, who retired in September 2010.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for the claimant. Bryce D. Benedict of Topeka, Kansas, appeared for respondent and its insurance fund.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

These two separate claims for injuries to claimant's right and left knees were consolidated for litigation but the parties expected separate awards for each docketed claim. In Docket No. 1,044,195, it was undisputed claimant suffered work-related injuries to his left knee on September 18, 2006. The only disputed issue was the nature and extent of disability.

In Docket No. 1,044,194, claimant alleged accidental injury to his right knee on July 27, 2006. Respondent denied claimant suffered accidental injury arising out of and in the course of his employment.

The Special Administrative Law Judge (SALJ) found claimant suffered a work-related accidental injury to his right knee on July 27, 2006, and awarded claimant a 40 percent permanent partial disability to the right leg in Docket No. 1,044,194. The SALJ determined claimant suffered a 17 percent permanent partial disability to the left leg in Docket No. 1,044,195.

Respondent requests review of the nature and extent of disability in both claims as well as whether claimant's right knee injury (Docket No. 1,044,194) arose out of his employment with respondent. Respondent argues that claimant has no right knee impairment when the preexisting degenerative disease is discounted and therefore respondent should be reimbursed for the cost of the total right knee replacement surgery. Respondent further argues the ratings of Drs. Schmidt and Bieri regarding claimant's left knee should be averaged together to find a 6 percent permanent partial disability.

Claimant requests review of the nature and extent of disability in Docket No. 1,044,195 (left knee). Claimant argues the percentage of permanent partial disability for the left knee should be increased to 50 percent. Claimant further argues that the SALJ's Award in Docket No. 1,044,194 (right knee) should be affirmed.

The issue raised on review by both parties in Docket No. 1,044,195 is the nature and extent of disability.

The issues raised on review by respondent in Docket No. 1,044,194 are whether claimant suffered accidental injury arising out of and in the course of his employment; and if so, the nature and extent of disability and whether respondent should be reimbursed for the total right knee replacement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

David Finger began working for Lansing Correctional Facility on July 10, 1989. His job as a shift lieutenant required him to stand a lot, climb stairs and also run when responding to alarms indicating an emergency situation. On July 27, 2006, he injured his right knee while responding to an alarm. He was running to get to the site of an altercation when his knee popped and he was unable to continue running due to an immediate onset of pain. After that incident at work, he stated he felt something loose in his right knee and

it would occasionally cause his knee to lock. On those occasions he would manipulate the loose body until he could again bend his knee and walk.

Before this injury, claimant had injured his right knee and underwent a partial medial meniscectomy on October 26, 1998. After that procedure claimant had ongoing symptoms in his right knee and received medication as well as steroid injections two or three times a year. But claimant worked without restrictions and was able to run up and down stairs.

After the July 27, 2006 incident at work claimant sought treatment for his right knee with his family physician and was referred to Dr. Michael Schmidt, who is board certified in orthopedic surgery. He first examined claimant on August 16, 2006. Dr. Schmidt referred claimant for an MRI of the right knee which was performed on August 17, 2006. The MRI was interpreted as demonstrating findings consistent with tears of both the anterior and posterior cruciate ligaments. There was evidence of the prior resection of the medial meniscus and a horizontal tear in the posterior horn as well as patellofemoral osteoarthritis with joint effusion.

At a follow-up visit with Dr. Schmidt on September 6, 2006, the doctor reviewed the MRI findings and upon examination noted that claimant had a very obvious palpable loose body which moved around limiting claimant's flexion and causing severe pain. Arthroscopic surgery was recommended and scheduled for September 20, 2006.

On September 18, 2006, claimant suffered an injury to his left knee when he was shaking down an inmate's cell and ended up in an altercation with the inmate. Claimant testified he did not have any problems with his left knee before the injury.

On September 20, 2006, Dr. Schmidt performed arthroscopy on claimant's right knee with removal of the osteochondral loose body and articular shaving. But the anterior cruciate ligament and posterior cruciate ligament were found to be intact. During the arthroscopic procedure the doctor noted that the posterior half of the medial meniscus was absent and there was an area of Grade IV chondromalacia with exposed bone of the medial tibial surface. On the femoral side there was Grade I and II chondromalacia but no obvious exposed bone.

As claimant underwent post-operative rehabilitation for the right knee he continued to have pain complaints in both knees. An MRI of claimant's left knee revealed internal derangement and a tear of the medial meniscus. An arthroscopic partial medial meniscectomy was performed on claimant's left knee on January 17, 2007. There was exposed bone noted in the medial compartment. Claimant continued to complain of pain in both knees and Dr. Schmidt administered intra-articular steroid injections to both knees.

Dr. Schmidt diagnosed severe degenerative disk disease in both knees and by July 2007 claimant's right knee was more symptomatic and a total knee arthroplasty on the right was performed on September 4, 2007. After post-operative rehabilitation the claimant was

released to regular duty without formal restrictions on November 19, 2007. Claimant currently has pain in his knees but he is back working for respondent performing his regular job duties.

On May 15, 2008, Dr. Schmidt issued a disability rating for claimant's right knee. The doctor opined claimant had a good result from his total knee replacement and has a 37 percent impairment to the right lower extremity. The doctor further opined that 50 percent of the need for the right total knee replacement stemmed from the work-related injury on July 27, 2006, resulting in dislodgement of the loose body that eventually caused significant damage to the joint. And the doctor opined that 50 percent of the need for the total knee replacement was due to pre-existing degenerative changes. Finally, Dr. Schmidt opined the injury on July 27, 2006 would not have occurred but for the pre-existing condition of degenerative joint disease.¹

On June 10, 2008, Dr. Schmidt issued a disability rating for claimant's left knee. The doctor opined claimant has a 5 percent impairment to the left knee following a subtotal medial meniscectomy. The doctor further opined that the severe degenerative change of the medial compartment was a preexisting condition not directly related to the work-related incident of September 18, 2006.²

But when the doctor testified at his deposition he agreed that the two work-related injuries aggravated the degenerative conditions in both of claimant's knees. Dr. Schmidt testified:

Q. Right. I want to make sure I'm clear, Doctor, with regard to the left knee would it be your opinion that the degenerative changes that were present were aggravated by the work related injury of September 18, 2006, aggravated, accelerated, or intensified?

A. I believe the degenerative changes preexisted that and were aggravated by that injury, yes.

Q. All right. And would the same be -- or could the same be said for the right knee with regard to the injury?

A. Yes.³

Dr. Schmidt also testified that running was not likely a cause for the loose body in the knee to dislodge. He testified:

¹ Schmidt Depo., Ex. 1.

² *Id.*, Ex. 2.

³ *Id.* at 24.

Q. Would Mr. Finger's running 50 feet have been a sufficient competent cause or trauma to have caused that loose body?

A. Running after a fall or just running?

Q. Just running.

A. To have generated a loose body like that. I don't know if that would have discharged a loose body. Usually, it's some type of fall or a --you know, a blow to the knee of some kind, athletic injury, but I suppose if he twisted or turned on it in the process of running and I don't recall whether he was going up or down stairs.

Q. Okay. If there -- if his testimony was merely that he was running from one location to another without any twisting, without any stairs in your medical opinion is it more likely than not that there was no dislodgement at that time?

A. I would doubt that that activity would dislodge a loose body.⁴

But as previously noted, Dr. Schmidt opined that claimant had degenerative changes in both knees which were aggravated by his work-related injuries.

Dr. P. Brent Koprivica, board certified in emergency and occupational medicine, examined and evaluated claimant on February 23, 2009, at claimant's attorney's request. The doctor reviewed medical records and took a history from claimant. Upon physical examination, Dr. Koprivica found an increased circumference of the left knee compared to the right associated with degenerative change and possible effusion. At the time of the evaluation, the doctor determined claimant was at maximum medical improvement. The doctor further opined that claimant's right total knee arthroplasty was medically reasonable and a direct result of his work-related injury. Dr. Koprivica also opined that claimant's accidental injury on September 18, 2006, aggravated, accelerated and intensified his degenerative joint disease in the left knee.

Based on the AMA *Guides*⁵, Dr. Koprivica rated claimant's right total knee arthroplasty at 50 percent of which he found 10 percent to be preexisting due to partial medial meniscectomy and the progression of post-traumatic degenerative joint disease over time. Therefore, the July 27, 2006 injury results in a 40 percent to the right lower extremity. The doctor opined that claimant may need a revision of his right total knee arthroplasty in the future.

⁴ *Id.* at 13-14.

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

As per claimant's left knee injury on September 18, 2006, which resulted in a medial meniscus tear along with aggravation and acceleration of his underlying degenerative joint disease, Dr. Koprivica opined claimant will require a left total knee arthroplasty. The doctor rated claimant's left knee at 50 percent due to the bone-on-bone in the medial compartment which is caused by his work-related injury.

Dr. Koprivica testified:

Q. Under the AMA Guides generally, can you have impairment with an asymptomatic joint such as the knee? In other words, if Mr. Finger is asymptomatic and fully able to do his activities of daily living, is it appropriate under the Guides to issue a rating?

A. Not how I interpret it. If you look at page two, it outlines the percentage number is to be reflective of the loss of ability to do activities of daily living in terms of the impairment percentage. So if the hypothetical is if there is no impact on the ability to do activities of daily living based on the condition, then it's not impairing and there would be no impairment assigned.⁶

On May 5, 2009, the ALJ ordered an independent medical examination by Dr. Peter Bieri to determine a functional impairment rating for both knees and whether a preexisting impairment existed before the July 27, 2006, on the right knee and September 18, 2006, on the left knee. Dr. Bieri performed a physical examination of claimant on August 17, 2009, and determined claimant had reached maximum medical improvement. Based on the *AMA Guides*, the doctor rated claimant's right knee at 50 percent due to the total knee replacement and persistent pain. Dr. Bieri noted that Dr. Schmidt apportioned 50 percent of claimant's current right knee impairment to preexisting degenerative joint disease and 50 percent due to the July 27, 2006 injury. Dr. Bieri agreed and apportioned his rating at 25 percent preexisting impairment and 25 percent due to the accidental injury on July 27, 2006. The doctor gave a 5 percent left lower extremity impairment for patellofemoral pain and an additional 2 percent for the partial medial meniscectomy. These impairments combine for a 7 percent to the left lower extremity which is directly attributable to the September 18, 2006 injury. He also opined that claimant had an additional 10 percent impairment to the left lower extremity due to an aggravation of the preexisting degenerative joint disease. These two left extremity impairments combine for a 17 percent functional impairment.

Initially, in Docket No. 1,044,194, respondent argues that claimant failed to meet his burden of proof that he suffered a work-related accident on July 27, 2006, when his knee popped while he was running to respond to an alarm.

⁶ Koprivica Depo. at 11.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.⁷ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.⁸

Claimant described his accident in the following manner:

I believe I was sitting on the steps going into the max chow hall. There was an alarm in the max clinic. I got up and started running and I'd almost got to the clinic when something popped in my knee and I couldn't run anymore. I reached down and I felt a lump on the side of my knee. And I learned that you can push the lump and it would go away and then there wasn't any pain.⁹

In this instance Drs. Schmidt, Bieri and Koprivica all agreed that the incident at work on July 27, 2006 aggravated the preexisting degenerative disk disease in claimant's right knee. Consequently, the Board affirms the SALJ's finding that claimant met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment on July 27, 2006.

As a result of the right knee injury and resultant surgeries, including the right knee total arthroplasty, Dr. Schmidt opined claimant had a 37 percent permanent partial disability to the right lower extremity. Dr. Koprivica opined claimant had a 50 percent permanent partial disability to the right lower extremity but that 10 percent was pre-existing. Accordingly, Dr. Koprivica opined that as a result of the accidental injury on July 27, 2006 claimant has a 40 percent permanent partial disability to the right lower extremity. Dr. Bieri also opined claimant suffered a 50 percent permanent partial disability to the right lower extremity. But Dr. Bieri then concluded that Dr. Schmidt had apportioned 50 percent of his rating to preexisting degenerative joint disease and 50 percent to the July 27, 2006 accidental injury. The difficulty with Dr. Bieri's 50 percent apportionment is that Dr. Schmidt never apportioned claimant's functional impairment. In his report Dr. Schmidt's 50 percent comment was made in reference to what caused claimant's need for the right total arthroplasty and in that respect the doctor had opined that the need for surgery was equally due to the preexisting degenerative joint condition and the accidental injury. Consequently, Dr. Bieri's reliance upon a non existent functional impairment apportionment by Dr. Schmidt is not persuasive. The Board affirms the SALJ's finding that Dr. Koprivica's

⁷ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁸ *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

⁹ R.H. Trans. at 12.

opinion is the most persuasive and affirms the finding that claimant suffers a 40 percent permanent partial disability to his right lower extremity.

In Docket No. 1,044,195, Dr. Schmidt opined claimant suffered a 5 percent permanent partial disability to the left knee. Dr. Bieri opined claimant suffered a 5 percent left lower extremity impairment for patellofemoral pain, 2 percent left lower extremity impairment for partial medial meniscectomy and for aggravation of the pre-existing degenerative joint disease a 10 percent left lower extremity impairment. The doctor further opined that all the left lower extremity impairments would combine for a 17 percent permanent partial left lower extremity impairment. Dr. Koprivica opined that because the left knee was bone on bone claimant suffered a 50 percent permanent partial impairment to the left lower extremity. The SALJ adopted the court ordered independent medical examiner's rating of 17 percent to the left lower extremity. The Board agrees and affirms.

AWARD

WHEREFORE, it is the decision of the Board that the Awards of Special Administrative Law Judge Jerry Shelor dated July 14, 2010, are affirmed.

IT IS SO ORDERED.

Dated this 31st day of January, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Fund
Jerry Shelor, Special Administrative Law Judge
Steven J. Howard, Administrative Law Judge